APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 394—64

(Decided April 19, 1968)

JAMES J. RITTER

v.

THE UNITED STATES

DANIEL M. GRIBBON, *attorney of record, for plaintiff.* BRICE M. CLAGETT and COVINGTON & BURLING, *of counsel.* KNOX BEMIS, with whom was *Assistant Attorney General* MITCHELL ROGOVIN, *for defendant.* PHILIP R. MILLER, *of counsel.*

Before COWEN, *Chief Judge,* LARAMORE, DURFEE, DAVIS, COLLINS, and SKELTON, *Judges.*

Opinion

PER CURIAM: This case was referred to Chief Trial Commissioner Marion T. Bennett with directions to make findings of fact and recommendation for conclusions of law under the order of reference and Rule 57(a).

The commissioner has done so in an opinion and report filed on August 16, 1966. Exceptions to the commissioner's report and opinion were filed by the parties and the case has been submitted to the court on the briefs of the parties and oral argument of counsel. Since the court agrees with the commissioner's findings, opinion and recommended conclusion of law, as hereinafter set forth, it hereby adopts

the same as the basis for its judgment in this case.* Therefore, plaintiff is not entitled to recover and the petition is dismissed.

Opinion of Commissioner

BENNETT, *Chief Commissioner:* This is an action to recover federal income taxes and interest thereon attributable to certain payments made to plaintiff by his employer in 1958. The issue is whether these payments, which were occasioned by a transfer of plaintiff's place of employment for the convenience of his employer, constitute ordinary income to plaintiff and, if so, whether plaintiff taxpayer may deduct as expenses the items for which payments were made. It is concluded on the law and the evidence that the payments are taxable as ordinary income, are not deductible, and that plaintiff's claim must be dismissed.

In the summer of 1957, plaintiff, then Regional Controller for the Western Region of the Data Processing Division of International Business Machines Corporation, hereinafter referred to as IBM, was informed that the Western Regional Headquarters were to be moved from San Francisco to Los Angeles in the fall of 1958 and that he, as Regional Controller, would similarly be required to relocate in order to retain his position within the company. At the time of plaintiff's move, it was IBM's established policy to reimburse its employees for certain expenses incurred when they were required by IBM to transfer from one location to another on a permanent basis. The tax effect of these reimbursements is now contested.

The first reimbursement question relates to IBM's so-called "Moving and Living Expense Policy" under which IBM reimbursed plaintiff for certain expenses he incurred in arranging for the sale of his home in the Mill Valley

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* The concurring in part and dissenting in part opinions of DAVIS, *Judge,* and SKELTON, *Judge,* follow the opinion of the Trial Commissioner which has been adopted by the court.

area of San Francisco, the movement of his household to Los Angeles, and the acquisition of a new home in the Los Angeles area. These reimbursed expenses which totaled $4,177.46 were not included by taxpayer in his income. It is the Service's basic disagreement with this treatment which is the essence of the present dispute.

Relying upon Rev. Rul. 54-429, 1954-2 CUM. BULL. 53, the Internal Revenue Service included the reimbursements for the following so-called "indirect expenses" in plaintiff's income:[1]

(a) Real estate appraisal of plaintiff's residence in Mill Valley	$130.00
(b) Advertising the Mill Valley residence for sale in the Wall Street Journal	15.75
(c) Various upkeep and double interest charges for Mill Valley residence pending its sale after move to Los Angeles	330.78
(d) Closing costs on purchase of Los Angeles home	500.00
(e) Installation of carpeting in Los Angeles home	132.82
(f) Miscellaneous expenses of the move	100.00
(g) Remaking and rehanging draperies in Los Angeles residence	245.00
Total	1,454.35

There is no dispute between the parties that these expenses were actually incurred, that they would not have been incurred but for the move required by IBM, or that they are reasonable in amount.

[1] It should be pointed out that a portion of the reimbursed expenses ($2,723.11) designated by the Service as "direct moving expenses" (*i.e.*, the expenses of moving himself, his family, and his household goods), while not included by plaintiff in income, is nevertheless recognized by the Service as a proper exclusion from income and is not in issue in this proceeding.

The next item of reimbursement in issue is under a policy called the "Home Guarantee Policy,"[2] which provided financial assistance to all employees of IBM who owned homes they had to sell in order to transfer to a new location. The plan provided that an employee required to move at the request of IBM would receive no less than a guaranteed return upon the sale of his home, equal to its "appraised value" at the time of the required move. In summary, the Home Guarantee Policy was administered in the following manner: An employee's home would be appraised by two independent, qualified appraisers. One appraiser was selected by a local bank appointed by IBM to administer the policy in the particular locality and the other appraiser was selected by the employee from a list of qualified appraisers furnished the employee by the local bank. If the two appraisals differed by more than 5 percent, a third appraiser would be selected by the employee from the bank's list. The appraised value was the average of the two highest appraisals. Once the appraised value was determined, the employee could elect to enter into the Home Guarantee Policy under which IBM would guarantee that upon the sale of the home the employee would receive the full appraised value. The policy provided:

> If the net selling price of the employee's home is less than its appraised value, IBM will reimburse the employee for the difference between the two amounts.

The net selling price was defined as the selling price less certain selling costs, such as broker's commission, lawyer's fees, tax stamps, and title insurance.

Plaintiff's residence was appraised under the policy at $38,737.50. Despite the selling efforts of the plaintiff, the

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[2] At the time of the appraisal of plaintiff's home, IBM's Home Guarantee Policy was formally embodied in a document entitled "Moving and Living Policy—Financial Assistance Plans for Regular IBM Employees Moved at Company Request."

local bank and local realtors, a firm offer to purchase the residence was not received until October 2, 1958, some 2 weeks after plaintiff had moved to Los Angeles. The offer to purchase was at a gross price of $34,000 and, since this offer was more than 10 percent below the appraised value, under the terms of the policy, the special consent of IBM had to be obtained before the offer could be accepted.

The local bank recommended acceptance, IBM agreed, and the transaction was closed with the plaintiff selling his residence to an unrelated third party for $34,000 on November 6, 1958. It does not appear that the appraised value of plaintiff's residence was inflated to give him any amount over the fair market value at the time IBM directed his transfer. On November 6, 1958, plaintiff's basis for determining gain or loss was $37,640.67.

Under the terms of the Home Guarantee Policy, the net selling price received by plaintiff was $31,665.60. IBM reimbursed plaintiff for the difference between $31,665.60 and $38,737.50 for a net of $7,071.90. The Internal Revenue Service included this amount in plaintiff's gross income for 1958 as additional compensation. Plaintiff has paid a capital gains tax and resists the higher payment arising from defendant's treatment of the sums involved as ordinary income.

The Moving and Living Expense Policy

Plaintiff contends that he should not be required to pay income taxes on amounts received by way of reimbursement for expenses resulting from a move undertaken primarily for the convenience of his employer. More specifically, plaintiff contends that these reimbursements are not income as defined by the Internal Revenue Code of 1954, § 61, 68A Stat. 17, in that these reimbursements do not constitute wages, incentive compensation, or any other form of income nor do they bear "the essential elements of income." Alternatively, plaintiff contends that in the event

these reimbursed expenses are income, then he is entitled to a deduction under sections 62 and 162 of the Code. 68A Stat. 17, 45.

Section 61(a)(1) of the Internal Revenue Code of 1954 provides:

> (a) GENERAL DEFINITION.—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:
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> (1) Compensation for services, including fees, commissions, and similar items;

The Treasury Regulations on Income Tax (1954 Code), section 1.61-1(a), state: "Gross income means all income from whatever source derived, unless excluded by law." 1 CCH 1966 Stand. Fed. Tax Rep. ¶ 630.

The Supreme Court has consistently given the term "gross income" as defined by the Revenue Code[3] a broad construction in order "to tax all gains except those specifically exempted." *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 430 (1955). In *Commissioner* v. *Smith*, 324 U.S. 177 (1945), taxpayer's employer gave him, as compensation for his services, an option to purchase stock and the Court, holding the option to be taxable income when exercised, stated that the term gross income as defined by the Revenue Act "is broad enough to include in taxable income any economic or financial benefit conferred on the employee as compensation, whatever the form or mode by which it is effected." 324 U.S. at 181.

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[3] The 1938 and 1939 Revenue Codes (52 Stat. 457; 53 Stat. 9) defined gross income as income "in whatever form paid • • • derived from any source whatever" and the 1954 Code as "income from whatever source derived." 68A Stat. 17. Adjusted gross income is gross income minus allowable statutory deductions and exclusions.

In *Commissioner* v. *LoBue*, 351 U.S. 243 (1956), the Court again broadened the concept of what is taxable compensation. Taxpayer was granted an option by his employer to purchase stock. The Court held that it made no difference whether the option was intended to give the employee a proprietary interest in the business or whether it was intended to be compensation, but that as long as an *economic benefit* is conferred upon an employee for the purpose of securing better services, then the employee has realized taxable income. The Court said:

> We have repeatedly held that in defining "gross income" as broadly as it did in § 22(a) Congress intended to "tax all gains except those specifically exempted." * * *
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> * * * When assets are transferred by an employer to an employee to secure better services they are plainly compensation. * * * Section 22(a) taxes income derived from compensation "in whatever form paid." * * * LoBue received a very substantial economic and financial benefit from his employer prompted by the employer's desire to get better work from him. This is "compensation for personal service" within the meaning of § 22(a). [351 U.S. at 246-47; § 61(a), 1954 Code, *supra.*]

In Rev. Rul. 54-429, 1954-2 CUM. BULL. 53, the Commissioner ruled that amounts paid by an employer, either directly or as reimbursements, to defray an employee's actual cost of moving himself and his family from one place of employment to another, where the change was primarily for the benefit of the employer, are excluded from gross income. However, amounts received as reimbursement for other expenses, sometimes called "indirect" or "extraordinary" expenses, related to the move do constitute income to the employee and no offsetting deduction is allowed.

Several courts of appeals have considered the tax consequences of indirect moving cost reimbursements and have

sustained the position of the Commissroner of Internal Revenue, holding such reimbursements includable in gross income and to be nondeductible personal living expenses. In *England* v. *United States,* 345 F. 2d 414 (7th Cir. 1965), *cert. denied,* 382 U.S. 986 (1966), taxpayer was transferred by his employer from Kansas City, Missouri, to Springfield, Illinois. The court held that reimbursements for the costs of meals, lodging, and expenses incidental to securing housing at the new post were personal living expenses and includable in income and were nondeductible as business or travel expenses while away from home. See also *Cockrell* v. *Commissioner,* 321 F. 2d 504 (8th Cir. 1963).

In *Commissioner* v. *Mendel,* 351 F. 2d 580 (4th Cir. 1965), taxpayer, a physician employed by the United States Veterans Administration, was required by the Government to move from Newark, New Jersey, to Richmond, Virginia, in 1957. In making the transfer, taxpayer incurred direct moving expenses for which he was only partially reimbursed. He sought to deduct the difference. The court, reversing the Tax Court and disallowing the deduction for the cost of packing, transporting, storage and handling of furniture in transit and for the cost of hotels and meals in transit, stated:

> • • • The approach we must follow in a resolution of the issue is one exemplified by United States v. Woodall, 255 F. 2d 370 (10 Cir. 1958), namely, that any economic or financial benefit conferred on an employee as compensation is gross income, and that there may be deducted from gross income only those expenditures expressly made deductible by statute.[4] Ordi-

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[4] United States v. Woodall, 255 F. 2d 370, 373 (10 Cir. 1958), "• • • it has • • • been long recognized that deductions are matters of legislative grace, *allowable only when there is a clear provision for them,* and do not turn upon equitable considerations. • • • What should be allowed as an expense deduction is a matter of policy for Congress, not the Courts." (emphasis supplied)

narily, reimbursement for moving expense to an existing employee would constitute gross income under the comprehensive definition in § 61(a) of the Revenue Code of 1954 * * *. Rev. Ruling 54-429, supra, sought to alleviate the rigors of the application of the statutory definition of gross income to reimbursement for moving expenses to an existing employee. An examination of the ruling discloses that its rationale is that reimbursement for moving expenses does not constitute gross income, *not,* as the Tax Court determined, that expenses of relocation are *per se* deductions for the employee. * * *. [351 F. 2d at 582; see also *Light* v. *Commissioner,* 310 F. 2d 716 (5th Cir. 1962).]

Plaintiff urges that *John E. Cavanagh,* 36 T.C. 300 (1961), should be controlling here. There, taxpayer was transferred from Washington, D.C., to Burbank, California, by his employer. Taxpayer was reimbursed for his transportation and moving costs and, in addition, reasonable living costs incurred in excess of living expenses while his household effects were in transit. The Tax Court held that Rev. Rul. 54-429, *supra,* applied and excluded all the expenses from income because it said such expenses should be regarded as the employer's expenses and not as reimbursement for the personal living costs of the taxpayer. The court said:

> * * * to the extent such reimbursements defray the ordinary and necessary food and lodging costs of an employee they represent payment of an *employee's* living expense and are income to him, but to the extent such reimbursements defray only reasonable and necessary extraordinary food and lodging expense required to be incurred by the employer, they represent repayment to the employee of an amount he has first paid for and in behalf of his employer and do not constitute income to him. They are the employer's costs, not the employee's. To the extent the

above ruling would require the inclusion in income of reimbursement for such extraordinary food and lodging costs, it is not a correct interpretation of section 22(a) or section 24(a) of the 1939 Code or sections 61 (a) and 262 of the 1954 Code. The prohibition against the deduction of personal living expenses has reference only to such expenses as are ultimately chargeable to the taxpayer. It has no applicability to such expenses properly chargeable to another which the taxpayer pays and for which he is reimbursed. [36 T.C. at 304.]

In holding for the petitioner with respect to both the transportation of his family and household effects and the reimbursements for extraordinary costs of food and lodging, the court in *Cavanagh* was of the view that reasonable expenses in moving are not personal expenses (otherwise reimbursement would constitute taxable income) so that necessarily they must be ordinary and necessary business expenses. As ordinary and necessary business expenses, the court reasoned, taxpayer was entitled to deduct from gross income the unreimbursed portion thereof.

Plaintiff here now asserts that since his expenditures resulted solely from the transfer of IBM's Western Region Headquarters to Los Angeles, the reimbursements are properly an expense of IBM, thus not a personal expense so not taxable as compensation. Plaintiff suggests that the proper test is, "if the event which caused the expenses for which the reimbursement was made was for the convenience of the employer, then such reimbursement is excludable from gross income." In other words, plaintiff suggests a "but for" approach. This was the approach adopted by the Tax Court in *Cavanagh, supra,* but subsequently ignored by the Court of Appeals for the Fifth Circuit in *Light* v. *Commissioner,* 310 F. 2d 716 (5th Cir. 1962), questioned by the Court of Appeals for the Fourth Circuit

in *Commissioner* v. *Mendel, supra,* and disapproved by the Seventh Circuit in *England* v. *United States, supra,* and the Eighth Circuit in *Cockrell* v. *Commissioner, supra.*

There is no rule of federal income taxation that categorizes an item as "personal" and then automatically requires that the reimbursement for such item be included in gross income. The tax results of any item depend upon the context within which the payment was received or the expense was incurred. *Cf. Commissioner* v. *Duberstein,* 363 U.S. 278 (1960). The questions as to who was primarily benefited by the reimbursement, what event caused the expenditure or whether there was a loss are not necessarily determinative as to whether a payment is income under the tax law. Of course, when an employer reimburses an employee for an obviously personal expenditure, such reimbursement is clearly taxable as compensation, even though such expenditure be causally connected with furthering the employer's business. For example, if an employer reimburses an employee for income taxes payable upon his salary, such reimbursement is income, *Old Colony Trust Co.* v. *Commissioner,* 279 U.S. 716 (1929); or, if an employer reimburses an employee for additional costs of driving a certain make of automobile or for living in a particular locality, such reimbursements would clearly constitute additional compensation. Similarly, if an employee is reimbursed for essentially personal expenses connected with an employer-directed move, such reimbursements are not excludable from income merely because the expenses would not have been incurred but for the move. *England* v. *United States, supra.*

Plaintiff also asserts that these reimbursements are not income in that the payments do not bear "the essential elements of income." He asserts that these reimbursements are not income because they were intended merely to alleviate a financial loss incurred as a result of the transfer. It is unnecessary to go into the matter of whether IBM intended

these reimbursements to be compensation. The law is well settled that the statutory definition of gross income is broad enough to include as compensation any economic or financial benefit from any source, conferred in any form on an employee, unless specifically exempted by statute. *Commissioner* v. *LoBue, supra; Commissioner* v. *Glenshaw Glass Co., supra; Commissioner* v. *Smith, supra.* IBM was concerned with getting its employee's talents transferred to the new location and, as such, the reimbursements were an incentive or inducement to get plaintiff to make the required move.

No claim has been made that these reimbursements were a gift; indeed, plaintiff specifically disavows any gift theory. IBM was motivated solely by its own business needs in making these reimbursements and since they are payments arising out of the employment relationship, conferring an economic benefit upon the taxpayer, *LoBue* requires these reimbursements to be included in income.

The next issue to be decided is whether plaintiff is entitled to a deduction under sections 62 or 162 of the 1954 Code for trade or business expenses. Plaintiff relies upon the principle of *Commissioner* v. *Flowers,* 326 U.S. 465 (1946). There the Court denied a deduction for commuting costs on the basis that the employer received no benefit from the taxpayer's choice of his place to live. Plaintiff, relying upon *Cavanagh, supra,* asserts that his expenses were incurred for the convenience of his employer because IBM required him to move to Los Angeles for its convenience. This contention has already been discussed. Just because these expenses were incurred as a result of an employer-directed move does not enable an employer to circumscribe the statutory prohibition against deducting any "personal, living, or family expenses." Int. Rev. Code of 1954, § 262, 68A Stat. 76. The deduction for personal or indirect moving costs has been denied by other courts as

noted above and was nowhere authorized by law or regulation.[4] Plaintiff is not entitled to the deduction claimed.

The Home Guarantee Payment

The final question to be considered is the tax consequences of $7,071.90 representing reimbursement for the loss on the sale of plaintiff's residence below the appraised value.

A decision of the Tax Court, *Otto Sorg Schairer*, 9 T.C. 549 (1947), lays down the now-abandoned rule that reimbursement for loss on the sale of a residence incurred as a result of a transfer to a new location is merely a return of capital. That is to say, the reimbursement should be treated for tax purposes as part of the amount realized from the sale of the taxpayer's residence and not as additional compensation to the taxpayer. RCA made a payment to a long-standing employee, transferred from New York to Princeton for the convenience of RCA. The payment represented the difference between the net selling price of the old residence and its cost. The court determined that the reimbursement was not income but additional proceeds from the sale of the home.

In *Jesse S. Rinehart*, 18 T.C. 672 (1952), the court limited the *Schairer* rule, holding that a payment received by an employee toward the purchase price of a new home at the new location was taxable as compensation in that it was an evidence of the employer's desire to assure the continued services of the employee. In *Arthur J. Kobacker*, 37 T.C. 882 (1962), a new employee was taxed at ordinary income rates on a reimbursement for loss on the sale of his home because the court found that the payment was bargained

[4] The Revenue Act of 1964, § 217, 78 Stat. 51, now permits an employee to deduct direct costs of moving his household goods and personal effects, including travel expenses, meals and lodging, to a new residence for employment at least 20 miles distant from his former residence.

for as a condition of accepting the new employment in a different city.

Finally, *Bradley* v. *Commissioner*, 324 F. 2d 610 (4th Cir. 1963), *affirming* 39 T.C. 652, held taxable as incentive compensation a payment by an employer reimbursing a new employee for the difference between the appraised value and the sales price of the old residence. The Tax Court, three judges dissenting, specifically declined to follow *Schairer*. The Court of Appeals affirmed, holding as "illusory" *Schairer's* reasoning that the payment was not compensation because it was intended only as a guarantee against loss of capital.

In *Bradley*, the home sale arose from circumstances where an employee left the employ of one company and went with a new company in a different city entirely for his own convenience. After the employee had been on the new job for 2 months, his new employer agreed to absorb any loss the employee might suffer on the sale of his residence at his former place of employment. The payment thereafter made was correctly found to be an inducement or a cash bonus to secure the services of the new employee[5] or a payment to secure better services, *LoBue, supra*, and not a return of capital. See also, to the same effect, *Willis B. Ferebee*, 39 T.C. 801 (1963).

Recently the Tax Court has reaffirmed its position in *Bradley, supra*, and *Ferebee, supra*, in a case bearing a similarity to the instant proceedings. *Ernest A. Pederson, Jr.*, 46 T.C. 155 (1966). Taxpayer, an employee of long standing with his company, was transferred for the convenience of his employer and at his employer's request from Detroit, Michigan, to Minneapolis, Minnesota. Several months after his transfer, taxpayer sold his Detroit residence at a loss notwithstanding a reimbursement by the

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[5] *United States* v. *Woodall*, 255 F. 2d 370 (10th Cir. 1958) *cert. denied*, 358 U.S. 824; *Kobacker, supra.*

employer of the selling expenses.[6] He attempted to distinguish cases in which a new employee was reimbursed for the loss from the sale of a house or of selling commissions from his own situation as an "old" employee with his company for 20 years. The court reviewed the history of these reimbursements and considered *Pederson* not to be distinguishable from *Bradley* and *Ferebee* and declared the reimbursement for selling expenses to be income. This was a final judicial abandonment of the rule in *Schairer, supra,* and of the line of cases given different tax treatment to old and new employees in similar factual situations. Additionally, the court said that such a reimbursement was not equivalent to direct moving expenses excludable as income under Rev. Rul. 54-429, *supra.*

Plaintiff argues strongly that the administration of the home guarantee plan did not operate as a subterfuge for additional compensation, but functioned only as a means of alleviating the financial loss which plaintiff sustained as a result of the required move. Thus, plaintiff argues that the payment was nothing more than a return of capital or a part of the amount realized from the sale under section 1001(a) of the Code, 68A Stat. 295, and that he has properly paid a capital gains tax on this transaction and owes nothing more.

In theory, when a taxpayer receives back funds which he has invested, these funds do not represent taxable income but are instead a return of capital. See generally 1 MERTENS, FEDERAL INCOME TAXATION § 5.06 (1962). However, the reimbursement in issue here cannot be considered as part of the amount realized from the sale of the home and, therefore, a return of capital. "A loss on the sale of a home is essentially a personal loss. Any reimbursement to the taxpayer of such loss means taxable income is realized."

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[6] Taxpayer reported his basis for the Detroit residence as $16,546 and the sales price as $15,000. The selling expenses amounted to $1,088 so taxpayer, even considering the $1,088 reimbursement, still suffered a net loss.

James D. Hayes, 25 CCH Tax Ct. Mem. 636 (1966). The reimbursement was separate and distinct from the sale. No reimbursement would have been made had plaintiff sold his home for the appraised value; no property interest whatever passed to IBM; the only *quid pro quo* IBM received was its employee's "peace of mind." IBM did not make such payments for the purely altruistic reason of alleviating a financial loss incurred by a move for its convenience, but for two good business reasons: To encourage plaintiff to make the required move by relieving him of anxiety and worry over the problem of selling his home and to assure IBM of his experience, talents and skills where and when it wanted them. As such, the reimbursement is an incentive payment, taxable as income, and in essence no different from the "moving expense reimbursement" considered under the first part of this opinion.

Defendant urges still another consideration upon the court in support of its contention that the Home Guarantee Policy contained elements of compensation in it for plaintiff. Under this policy plaintiff was guaranteed the average of the two highest appraisals. More, plaintiff was guaranteed this appraised value as the *net* proceeds on the sale of his home though it is within common knowledge that a seller of a home cannot hope to realize the gross sales price as his net return. Under such an arrangement, IBM might have to pay a premium price to insure plaintiff's move to Los Angeles. Indeed, as it turned out, the ultimate sales price was much less than the appraised price which was guaranteed and the latter was more than plaintiff's adjusted cost basis for determining gain or loss on the property. The knowledge that he was guaranteed such a favorable price was no little incentive to go along as his employer wanted. There is no valid basis for treating this reimbursement as a return of capital and excluding it from regular income.

Viewing this case in its simplest terms, the thrust of it is that plaintiff by reason of his employment was required

to move, that he sustained expenses and losses for which he was largely but not altogether made whole through the generosity and good business and personnel policies of his employer—but that if he has to pay a tax on these reimbursements as ordinary income his true income is distorted and he is made poorer because of the move for his employer's benefit. The term income, however, is a broad concept which includes any economic gain from whatever source,[7] and deductions and exclusions from it are specifically defined and must be strictly construed. *Commissioner* v. *Jacobson*, 336 U.S. 28 (1949); *Commissioner* v. *Glenshaw Glass Co., supra; Commissioner* v. *Smith, supra; Commissioner* v. *LoBue, supra.* Economic gain does not necessarily require profit in its usual sense. *United States* v. *Woodall, supra.*

Since taxable income is a statutory term and taxation does not profess to embody perfect economic theory, *Weiss* v. *Wiener*, 279 U.S. 333 (1929), nor to be based on implications or logic, *Cockrell, supra,* or equity, *Woodall, supra,* the relief in a situation such as here cannot be judicial but depends on legislative grace within the exclusive province of Congress[8] which alone can create deductions or exclu-

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[7] See generally 1 MERTENS, FEDERAL INCOME TAXATION § 5.03 (1962).

[8] Indeed, in the consideration of the Revenue Act of 1964, the House refused to accept a Senate provision which would treat part of such reimbursements as an additional amount realized from the sale of the home. However, non-action by Congress or the refusal of Congress to enact a particular provision affords the most dubious foundation for drawing inferences as to the intent of an earlier Congress. *United States* v. *Price*, 361 U.S. 304, 313 (1960); *United States* v. *Wise*, 370 U.S. 405, 411 (1962); *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 349 (1963). The enactment of a new code section does not necessarily indicate that the prior rule was to the contrary but only that it was unclear. *United States* v. *Midland-Ross Corp.*, 381 U.S. 54, 60 (1965). Thus, congressional failure to enact such a provision has no relevance in the determination of whether these reimbursements are taxable and has not been considered in our determination here.

sions from income as it has defined it in the statute in issue here. Int. Rev. Code of 1954, § 61, *supra; United States* v. *Olympic Radio & Television*, 349 U.S. 232 (1955).

DAVIS, *Judge*, concurring in part and dissenting in part:

I can pick my way through this stony field only by looking for the separate paths open to judges, on the one side, and to legislatures and administrators, on the other. Confronted with broad concepts in a statute, a judge has much greater difficulty and less authority in summarily drawing exact lines, based on practicality, than do legislators or those who are granted power to administer a regulatory or taxing system. My difficulty here as a judge is that, faced with the all-inclusive words of Section 61(a) of the 1954 Revenue Code, I can see no theoretical or principled difference between "direct" and "indirect" moving expenses.[1] Yet since 1954 the Internal Revenue Service has ruled that reimbursement for the former, and those alone, need not be included in gross income. Rev. Rul. 54-429, 1954-2 Cum. Bull. 53. Perhaps the IRS draws the authority to make this distinction, on pragmatic grounds, from its general regulatory power, or perhaps the ruling has to be accepted, in both its affirmative and its negative aspects, because of its age. *Cf. United States* v. *Correll*, 389 U.S. 299, 304-07 (1967). Certainly Congress could make the separation if it wished, but it did not do so for the taxable year with which we are concerned. With only "indirect" moving expenses before us, the safest course for me, as a judge, is to apply § 61(a) without regard to the Revenue Ruling but under the guidance of *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426 (1955), and

[1] It is said that "direct" moving expenses are not subject to personal choice, but we all know of the great fluctuations in the forms and expense of moving household goods as well as the variations in modes and cost of transporting families. The small difference, in this respect, between "direct" and "indirect" expenses seems to me not the kind of distinction judges can find in a statute as broad and general as § 61(a).

Commissioner v. *LoBue,* 351 U.S. 243 (1956). In the light of the great scope of § 61(a), as indicated in those and comparable decisions, I concur with the court that the reimbursement for "indirect" moving expenses was includable in taxpayer's gross income, probably as part of his "compensation for services, including fees, commissions, and similar items."

I part company, however, on the deductibility of these expenses. The Tax Court, *en banc* (with three dissents), has recently ruled that, in almost identical circumstances, an employee-taxpayer can deduct his "direct" moving expenses as ordinary and necessary business expenses. *Edward N. Wilson,* 49 T.C. No. 43, ¶ 49.43 P-H T.C. decided Jan. 24, 1968; see, also, *Vaal R. Dodd,* P-H Memo T.C. ¶ 68,023, decided February 6, 1968. I agree with that view. Since I can make no distinction, as a judge, between "direct" and "indirect" moving expenses, and since, in the area of the deductibility of such expenses there is no precise statutory or administrative guidance, I must apply the rule of the Tax Court's *Wilson* case to the present taxpayer's "indirect" costs.

On the other aspect of the case, the "home guaranty payment", I agree with the court. Like the reimbursement for moving expenses, this payment appears to be "gross income" under § 61(a) as interpreted by the Supreme Court. Chief Commissioner Bennett's opinion rightly points out that a payment of this kind is not part of the proceeds of a capital asset and is not a return of capital. The remaining question is whether taxpayer is entitled to a deduction on account of the reimbursed house-loss. In *Edward N. Wilson, supra,* the unanimous Tax Court held, in the same opinion which upheld the deductibility of "direct" moving expenses, that a similar "loss from the sale of a personal residence does not constitute a capital loss", and also that the loss was not a deductible business expense. I accept that position and therefore concur on this point with our court which rules the same way in this case.

SKELTON, *Judge*, concurring in part and dissenting in part:

I join in the concurring and dissenting opinion of Judge Davis, except I would limit the "indirect costs" as deductible items to those costs which were reasonable expenses of the move. Of course, these costs will vary with the facts of each case, depending on the circumstances of the taxpayer and his station in life. Applying this rule to this case, I would hold that the only deductible "indirect costs" which appear to be reasonable as moving expenses are:

Remaking and rehanging draperies	$245.00
Installation of carpeting	138.82
Total	383.82

Of course the interest and taxes on the Mill Valley residence in the sum of $289.08 are deductible as such instead of moving expenses.

I would enter judgment according to this opinion.

Findings of Fact

1. Plaintiff, James J. Ritter, is, and at all times relevant here has been a citizen of the United States and now resides at 5138 Oakwood Avenue, La Canada, California.

2. Plaintiff's 1958 federal income tax return, hereinafter referred to as the 1958 return, a joint return with his wife, Hazel R. Ritter (now deceased), was timely filed with the District Director of Internal Revenue for the Los Angeles District.

3. The 1958 return as originally filed showed adjusted gross income of $20,028.82, taxable income of $14,542.84, with a total tax liability of $3,476.75.

4. In his 1958 return, plaintiff reported, among other items, an alleged long-term capital gain in the amount of $858.21 (correct figure should have been $858.71), as follows:

Kind of property	Date acquired	Date sold	Sales price	Cost
Residence	4/1/57	10/24/58	$38,737.50	$37,878.79

Fifty percent of the $858.21 capital gain was included in plaintiff's taxable income along with 50 percent of certain other long-term capital gains arising from the sale of securities; the alternative capital gains tax was not elected. The residence referred to was 377 Vista Linda, Mill Valley, California, a suburb of San Francisco, hereinafter sometimes referred to as the Mill Valley residence.

5. Upon audit of the 1958 return by representatives of the Commissioner of Internal Revenue, plaintiff's income tax liability for 1958 was increased from $3,476.75 to $8,060.39, an increase of $4,583.64. Plaintiff executed a partial agreement to the additional assessment and paid an additional amount of tax and interest in the amount of $1,462.23 on December 20, 1961 (tax of $1,259.63 and interest of $202.60). The balance of the deficiency, $3,324.01 (original deficiency of $4,583.64 less partial payment of $1,259.63), and interest thereon of $1,055.37 (or a total of $4,379.38) were paid in full on July 30, 1964, to the District Director of Internal Revenue for the Los Angeles District.

6. Plaintiff filed an amended claim for refund of his 1958 federal income taxes in the amount of $3,324.01, plus interest, on September 15, 1964, with the District Director of Internal Revenue for the Los Angeles District. The claim was rejected on November 4, 1964.

7. The amount of tax in controversy in this case arises from the treatment of two categories of items involved in plaintiff's 1958 federal income tax liability:

(a) Certain reimbursements, in the amount of $1,454.35 paid to plaintiff by his employer, International Business Machines Corporation, hereinafter referred to as IBM, for expenses plaintiff incurred incident to a move at IBM's request in transferring his

place of employment from San Francisco to Los Angeles, were included in gross income and no corresponding deductions were allowed; and

(b) an amount ($7,071.90) paid to plaintiff by IBM, representing the difference between the appraised value of plaintiff's Mill Valley residence at the time the transfer was directed by IBM and the net proceeds from the sale of his residence, was treated as ordinary income instead of proceeds from the sale of the residence.

8. Plaintiff was first employed by IBM in 1952, has continued to be so employed, and is now Regional Manager of Finance Administration for the IBM Western Region of the Data Processing Division, with headquarters in Los Angeles. In the early summer of 1957, plaintiff was the Regional Controller for the Data Processing Division, Western Region, located in San Francisco. Plaintiff was informed that the Western Region Headquarters were being transferred to Los Angeles and, thereafter, on September 17, 1958, he moved his residence in Mill Valley to the Los Angeles area (Pasadena).

9. At the time of plaintiff's move, IBM had in effect certain policies known as the "Moving and Living Expense Policy" and "Home Guarantee Policy," dated August 15, 1958, hereinafter sometimes referred to as the IBM policies. The IBM Home Guarantee Policy applicable to the sale of plaintiff's Mill Valley residence was more fully known as the "Moving and Living Policy—Financial Assistance Plans for Regular IBM Employees Moved at Company Request," effective May 23, 1957.

10. Under the IBM Moving and Living Expense Policy, plaintiff received $4,177.46 from IBM as reimbursements for expenditures he had incurred in 1958 in connection with his move from San Francisco to Los Angeles. The Internal Revenue Service allowed as regular employee travel ex-

penses or nontaxable reimbursement expenses the sum of $2,723.11, but rejected the following items in the total amount of $1,454.35, the tax treatment of which is in controversy:

Expenses	Amount
Sale of Mill Valley Residence—Closing Costs:	
(a) Real Estate Appraisals	$ 130.00
(b) Advertising—Wall Street Journal	15.75
Double Expenses Attributable to Owning Two Houses at the Same Time:	
(c) Interest on Mill Valley residence (September 15-October 1, 1958)	46.72
(d) Interest on Mill Valley residence (October 1-November 1, 1958)	93.43
(e) Interest on Mill Valley residence (November 1-December 1, 1958)	93.43
(f) Taxes on Mill Valley residence	55.50
(g) Water bill	11.70
(h) Watering	5.00
(i) Gardening	25.00
Purchase of Pasadena residence:	
(j) Closing costs	477.85
(k) Miscellaneous expense (remainder of authorized $500)	22.15
Refitting Property for Use in the New Residence:	
(l) Remaking and rehanging draperies	245.00
(m) Installation of carpeting	132.82
Miscellaneous Expense:	
(n) Various items, such as the movers' tip and numerous out-of-pocket costs	100.00
Total	1,454.35

11. Under IBM's Home Guarantee Policy, plaintiff received $7,071.91 from IBM on November 7, 1958, representing the difference between the appraised value of the Mill Valley residence and the net proceeds from the sale of that residence. The federal income tax consequences of this payment are in controversy in this case. The amount of reimbursement was computed as follows:

(a) Appraised value under policy		$38,737.50
(b) Selling price	$34,000.00	
(c) Less deductible selling expenses:		
(1) Real estate brokerage commission	2,040.00	
(2) Legal costs	44.40	
(c) Less deductible selling expenses—Con.		
(3) Mortgage prepayment premium (but not over $250)	250.00	
Total deductible selling expenses	2,334.40	
Net selling price		31,665.60
Difference between net selling price and appraised value		7,071.90

12. All of the controverted reimbursements described in finding 10, above, as well as the home guarantee payment described in finding 11, above, were occasioned by plaintiff's 1958 move from San Francisco to Los Angeles; they would not have been incurred but for the move; and they were reported and substantiated to IBM as required by the IBM policies. Certain of the items as indicated below require additional explanation, as follows:

(a) *Brokerage commission of $2,040.* In the San Francisco area, the real estate commission is normally 6 percent and the special provisions of the IBM policies for areas with more than 5-percent customary commission were applicable.

(b) *Penalty premium of $250.* The plaintiff incurred a mortgage prepayment penalty of $611.52, but the IBM policies limit such reimbursements to $250.

(c) *Wall Street Journal advertisement.* Although not specifically authorized by the IBM policy then in effect, this reimbursement was approved.

(d) *Double interest expense for November 1958.* Although plaintiff actually sold his Mill Valley residence on November 6, 1958, his lending agency insisted upon the payment of a full month's interest for the month of November 1958, and IBM reimbursed plaintiff for this amount.

(e) *Miscellaneous expense of $22.15.* IBM limited reimbursements to $500 on account of the closing costs incurred in purchasing a new residence. The $22.15 miscellaneous charge, bringing plaintiff's total reimbursement up to $500, was more than used up by plaintiff in move-related expenditures. For example, plaintiff paid for the title policy coverage on his new residence in addition to that required by the mortgagee, as full title policy costs were not specifically covered by the IBM policy at that time.

(f) *Miscellaneous expense of $100.* The plaintiff, as a married man, fulfilled all the requirements of the IBM policy for reimbursement in the amount of $100. The plaintiff used some $20 to $25 of this amount to tip the employees of his movers, Allied Van Lines, Inc., and the remainder was expended on miscellaneous small expenses involved in the move.

13. The effect of the inclusion of the items mentioned in findings 10 and 11, above, in plaintiff's gross income for 1958, is as follows:

Explanation	Additional taxable income (net)	1958 taxable income	Tax	Additional tax
Per 1958 return	....	$14,542.84	$3,476.75	....
Partial settlement	$3,876.23	18,419.07	4,736.38	$1,259.63
Final payment	8,526.25	26,945.32	8,060.39	3,324.01

14. IBM conducts its operations in some 23 plants and laboratories and 200 branch and district offices throughout the United States. Valid business reasons justify and require the locations of these facilities. IBM sells directly to its customers and, accordingly, the locations of its sales offices and its service representatives are determined largely by the places of business of its customers. Considerations dictating the locations of plants and laboratories include the following: Available labor force, adequate housing for employees, community attitude, transportation costs, and a desire to avoid exc ss concentration in any single area. The business of IBM has been growing rapidly. In 1958 it was and continues to be necessary to open plants and offices at new locations.

15. On occasion, IBM transfers plants or offices from one location to another, based on valid business reasons, such as those mentioned above. IBM has also transferred headquarters units, such as the move of the Data Processing Division Headquarters from New York City to White Plains, New York, in 1957, and the move of the Western Region Headquarters of the Data Processing Division from San Francisco to Los Angeles in 1958.

16. Once the decision is made to place an IBM operation at a new location, whether as a transferred or a wholly new facility, IBM finds it good business practice to transfer a cadre of experienced IBM employees to the new location. Despite the expense of moving personnel, IBM finds that it expedites putting a new location into effective operation promptly to have experienced IBM personnel and not to rely solely on hiring new personnel. The personnel transferred, either as a cadre of a plant or in the move of a headquarters, may be promoted to new responsibilities in connection with the move or they may be transferred in grade with no change in pay and no change in responsibility.

17. IBM does not follow a policy of transferring its employees about the country on any fixed schedule. It makes

as few transfers as possible and only as business needs require the move. It moves approximately 3½ to 4 percent of its total number of employees in any given year. In 1957, when the reimbursement policies here in issue were instituted, IBM was facing several "mass moves" to new facilities at new locations, and was worried that employees whom it wished to move to the new locations might not see fit to move. This was the chief reason why IBM adopted the reimbursement plans.

18. In 1958, an IBM employee who was transferred for IBM's convenience to a new location was eligible to receive the following reimbursements under the IBM Moving and Living Expense Policy to assist in defraying the costs of the move:

(a) Traveling and living expenses during and for a stated, limited period after arrival at the new location.

(b) Moving expenses, which included the movers' fee and various miscellaneous expenses, such as automobile registration in the new state; mileage on personal car or auto rental while house hunting; cleaning expenses of the old and new residences; disconnecting and reconnecting appliances moved to the new location; custodial care and related service while house hunting; installing and altering carpets and draperies; tuning of TV set and piano; and a flat minimal miscellaneous expense allowance.

(c) Expenses up to $500 relating to purchasing a new home, if the employee sold his old home under the Home Guarantee Policy and purchased a home at the new location within 1 year from the sale of his former home.

19. The payments made by IBM in accordance with the IBM policies were made for the purpose of reimbursing its employees for certain expenses and losses incurred by them in effecting the transfer of their homes and places of employment for the convenience of IBM. Such payments were made to facilitate and induce the prompt transfer of those

employees whom IBM desired to move to a new location and to achieve greater efficiency by eliminating causes of their worry and discontent about moving.

20. Another objective of the IBM policies was to effect transfers deemed necessary in the conduct of IBM's business at the minimum expense consistent with fair treatment of employees required to relocate their homes and places of employment for the convenience of IBM. Such payments were intended to induce more of the employees whom IBM wanted to move to make the decision to move. The IBM policies recognize that an employee transferred to a new location for the convenience of his employer is required to incur expenses and is exposed to possible loss on the sale of his home attributable solely to the required move.

21. The payments made under the IBM policies constitute part of the cost of conducting IBM's business at multiple locations. The expenses and losses reimbursed under the IBM policies were related to the transfer of an employee's home and place of employment for the convenience of IBM.

22. The adoption of the IBM Home Guarantee Policy in 1957 was directly related to the increase in IBM's business in the late 1950's necessitating the establishment of new plants and offices throughout the United States. Prior to 1957, IBM had a Moving and Living Policy but no Home Guarantee Policy. An expanding business required a mobile work force.

23. IBM considered establishing a Home Guarantee Policy that required it to purchase the home from the employee. It rejected this approach because of the personnel difficulties it envisioned in purchasing homes from its employees. Also, IBM did not want to go into the real estate business. Its business is manufacturing and marketing business machines.

24. IBM hoped that in practice its guarantee of the appraised value of the transferred employee's home would

result in employee homes sold under the policy selling on average at the appraised value. Some homes were expected to sell above the appraised value and some homes below the appraised value. In those cases where the home sold above the appraised value, after expenses of the sale, IBM did not and does not deprive the employee of the extra proceeds but did not and does not reimburse the selling commission and other such costs. IBM finds that homes appraised under the Home Guarantee Policy are selling for about 96 to 97 percent of their appraised value. In the San Francisco area IBM's experience has been favorable. In the period 1957-64, the Bank of America supervised the appraisal of 115 homes of transferred IBM employees. Twenty-three employees dropped out of the program for one reason or another. The remaining 92 homes, with few exceptions, appraised and sold under an IBM home guarantee, have been appraised close to the ultimate sales price.

25. The sale of the employee's house at the old location under the Home Guarantee Policy is administered by some 200 banks throughout the country. These banks enter into an agreement with IBM whereby they undertake to supervise the appraisal of the transferred employees' houses and to advise IBM and its employees on the sales. IBM chose to have banks administer the Home Guarantee Policy for two main reasons. First, it was desirable to have the policy administered by people familiar with the local real estate market. Second, administration by a bank would serve to insulate IBM from the employee's housing problems. IBM did not want to be in the position of feeling it was necessary to justify appraisals to its employees. Administration by banks would provide an independent judgment of the value of the home and the offers received. IBM avoids giving any instructions to the appraisers; it does not select the appraisers; it does not deal directly with the appraisers. IBM's comments on the operation of the appraisal system are channeled through the administering

banks and are concerned for the most part with situations where the appraised value exceeds the sales price, increasing IBM's expense. IBM's concern is to keep the cost of the program as low as possible.

26. The appraised value of a transferred employee's home was determined in accordance with the provisions of the Home Guarantee Policy, in a reasonable and objective manner, designed to insure that the employee would receive the fair market value of his home at the time transfer was directed, regardless of when or at what price the home was ultimately sold. Neither IBM nor the banks engaged to administer the Home Guarantee Policy attempted in any way to influence the appraisers selected under the policy in their determination of the fair market value of the property involved.

27. The difference, if any, between the appraised value and the amount received by a transferred employee from the purchaser of his home was paid to the employee by IBM only if the house was actually sold.

28. Payments made by IBM under the Moving and Living and Home Guarantee Policies were not taken into account in any way by the management of IBM in determining appropriate levels of compensation for employees. Federal income tax was not, and is not, withheld from payments under the IBM policies and was not withheld from the payments to the plaintiff mentioned in findings 10 and 11, above.

29. The IBM policies are not discriminatory. The higher-paid supervisory employees are governed by the same policies as lower-paid employees. Also, relatively more lower-paid employees are moved than higher-paid ones. In 1963, a typical year, the salary range of employees moved was as follows:

	Percentage of transferred employees
Salary amount:	
$10,000 and under	44
$10,000-$15,000	30
$15,000-$25,000	21
Over $25,000	5

30. The only exception to the general proposition in finding 29, above, that the IBM policies apply to all employees, is in the instance of certain employees on temporary assignment as part of their regular IBM employment. These people may be in a location as long as a year, but with no expectation of remaining there and such employees are not eligible for the Home Guarantee Policy.

31. As to plaintiff's move, the decision to move the Data Processing Division, Western Region Headquarters, was made at IBM corporate headquarters in New York and the plaintiff was not consulted as to the wisdom of the move. IBM was constructing a new building in Los Angeles and occupancy was expected to be in the late summer or early fall of 1958. Plaintiff was told that the entire Data Processing Division, Western Region Headquarters, was to be transferred to Los Angeles and since the position of regional controller is a staff assistant to the regional manager, the plaintiff was asked and was expected by IBM to move to Los Angeles in the fall of 1958. One important factor in the location of the headquarters of the Western Region in the Los Angeles area was the inclusion of Texas in the region for the first time. This shifted the geographical center of the region to the south, away from San Francisco. Also, major customers of IBM in the aerospace industry had their operations in the Southern California area and it was and is an advantage to IBM to have regional headquarters near these customers.

32. Plaintiff was not singled out to move, as there was no discriminatory selection of personnel on account of salary level or position with IBM upon the transfer of the Data Processing Division, Western Region Headquarters, from San Francisco to Los Angeles.

33. Plaintiff continued to be the Regional Controller for the IBM Western Region after the 1958 move and was not promoted to his present position of Regional Manager of Finance and Administration until February 1963.

34. When notified of IBM's intention to transfer him from San Francisco to Los Angeles, plaintiff had three choices: (a) He could accept the transfer and move; (b) he could leave IBM; or (c) he could take a considerable demotion and remain with IBM in the San Francisco area. If he had insisted on staying in the San Francisco area, plaintiff would have been a salesman attempting to carve out a new territory and earning about $400 a month, plus any commissions that he could earn, versus the $21,000 a year that he was making as Regional Controller. Although the corporation did not pressure him, plaintiff knew that it was advisable for him to move. For example, the plaintiff's own superior in 1958, the then regional manager, did not agree to relocate with his position. He accepted a lower-paying job in Oakland, California, as an IBM branch manager with the result that his earnings dropped 30 percent in 1958 as compared to 1957. If the plaintiff had refused to move, he would have suffered a setback in his prospects with IBM from which it would have been difficult to recover.

Plaintiff was of the view that his only realistic choice was to accept the transfer and move.

35. If the plaintiff had refused the transfer, the alternative to staying in San Francisco at a lower-paying job with IBM, would have been to resign from IBM and find work with another company in the San Francisco area. If he had resigned from IBM, plaintiff would have lost service-based

benefits, such as, group life insurance and vacations. In addition, the IBM method of doing business and training its employees in its own specialized methods tends to give an IBM employee a special utility and competence for IBM work that is not readily transferable to another employer.

36. The plaintiff does not like to move about the country and his only transfer by IBM prior to or since the 1958 move was from Los Angeles to San Francisco in 1957.

37. When plaintiff moved to the San Francisco area in 1957, he considered himself a resident of that area and, in particular, a member of the Mill Valley community and would have preferred to remain there. He found San Francisco to be a beautiful and cosmopolitan city and considered Mill Valley to be a desirable place to live. It was his "home," as well as his legal residence. He had family ties in Mill Valley and in the San Francisco area and business acquaintances there outside his friends who were also employed by IBM. He belonged to a number of civic and business organizations in the San Francisco area.

38. Plaintiff did not enter into any agreement or understanding with IBM to use his move from San Francisco to Los Angeles as a means of increasing his compensation with or without incurring federal income tax liability.

39. Plaintiff was not reimbursed for all of his expenses occasioned by the move from San Francisco to Los Angeles. In 1958, plaintiff incurred and paid expenses of up to $5,000 in addition to those listed in finding 10, above, in connection with the sale of his Mill Valley residence and the establishment of his new residence in Pasadena, California. Furthermore, plaintiff had a 5½-percent mortgage on his Mill Valley residence but was required to contract for 6-percent financing on his new residence in Pasadena with a 7-percent second trust. He did not have to escrow (on "reserve" with the lending agency) local taxes and insurance in connection with the mortgage of his Mill Valley residence, but this was required in

Pasadena, thus increasing the monthly payments. Plaintiff was also out-of-pocket $361.52 of the mortgage prepayment penalty of $611.52, incurred on the sale of his Mill Valley residence, as IBM did not reimburse mortgage penalties in excess of $250.

40. The plaintiff's federal taxable income after adjustments, if any, by the Internal Revenue Service, for the years 1956, 1957, 1958, 1959, 1960, and 1961, respectively, was as follows:

1956	$11,025.69
1957	14,203.63
1958 (the year in question)	26,945.32
1959	19,911.93
1960	18,012.39
1961	21,024.22

In 1956, plaintiff's wife earned taxable income of $2,751.32 and, in 1957, $960.48, which amounts are included in the above figures.

41. On or about March 18, 1958, plaintiff asked to have his Mill Valley residence appraised in accordance with the IBM policies then in effect. The plaintiff, IBM, and the Bank of America followed the required procedure for forwarding information concerning the house and requesting, selecting and instructing the first two appraisers. The Bank of America selected an appraiser, Mr. J. M. Hackney, Jr., and the plaintiff selected Mr. William G. Rutherford from a carefully prepared and up-to-date list of independent real estate appraisers maintained by the Bank of America for this purpose.

Both J. M. Hackney, Jr., who appraised the Mill Valley residence at $32,450, and William G. Rutherford, who appraised the Mill Valley residence at $39,250, made written reports of their findings based on the willing-buyer, willing-seller concept as required by their instructions. Since there was more than a 5-percent difference between the first two

appraisals of the plaintiff's Mill Valley residence, a third appraisal was necessary. The plaintiff was notified of the appraisals and a third appraiser, Mr. Donald Geddes, was selected by the plaintiff and approved and instructed by the Bank of America as required by the IBM policies. Mr. Geddes, who appraised the Mill Valley residence at $38,225, like the first two appraisers, made a written report based on the willing-buyer, willing-seller concept. The Bank of America then notified plaintiff that the appraised value of the Mill Valley residence was $38,737.50, which is the average of the two highest appraisals of $39,250 and $38,225.

42. The appraisals of the Mill Valley residence made by Messrs. Hackney, Rutherford and Geddes were arm's-length, independent appraisals. Each was a recognized, experienced real estate appraiser. Plaintiff did not know any of these appraisers before their appraisals were made. None of these appraisers were influenced by officials of IBM or the Bank of America or by the plaintiff to arrive at anything other than the fair market value as defined in his instructions. Each appraiser found and reported what he judged to be the fair market value of the plaintiff's Mill Valley residence. The differences in the amounts of the three appraisals rendered in the case of plaintiff's home were not due to any improper influence having been brought to bear on any of the appraisers; they simply reflect honest differences in opinion as to the probable selling price of plaintiff's home. The use of the average of the two highest appraisals was a reasonable method to determine the appraised value of plaintiff's Mill Valley residence for the purposes of inducing the employee to move and assuring him that he could find out in advance of the move what he could expect to receive from the sale of his home.

43. The plaintiff accepted the IBM home guarantee of $38,737.50, entered into an agreement with IBM and co-operated fully with the Bank of America and local realtors

in the listing, showing, and selling of his Mill Valley residence. Despite the selling efforts, the Mill Valley residence did not sell at first and steps were taken to revive broker interest by lowering the asking price and making use of the multiple listing service which was authorized for the first time under the IBM policies iff the summer of 1958. Although plaintiff moved out of the Mill Valley residence on September 17, 1958, he did not receive a firm offer until on or about October 2, 1958. A deposit receipt was signed on that date, was sent to the Bank of America and approved by the bank and by IBM in accordance with the IBM Home Guarantee Policy. Final approval of the sale was given by R. G. Clift, Assistant to the Controller of the IBM Data Processing Division located in White Plains, New York. The special IBM concurrence in the bank's recommendation was needed because the bid was more than 10 percent below the appraised value. There is no evidence that M. Clift, the bank, or anyone else followed the bank's recommendation to accept the offer for anything other than good business reasons. Accordingly, plaintiff sold his Mill Valley residence at a gross sales price of $34,000 to an unrelated third party in a transaction which was closed on November 6, 1958. Shortly thereafter the Bank of America's escrow file was closed and IBM was so advised as required by the IBM policies.

44. The fact that plaintiff's home sold some 6 months after the appraisals were made under the Home Guarantee Policy, at a price lower than the appraised value and different from the estimates made by all three appraisers, does not reflect adversely on the honesty or objectivity of any of the appraisers. Real estate appraising is not an exact science, and any appraisal is simply an informed estimate of value. In the case of residential property, subjective considerations importantly affect the price that a seller is willing to take and that a buyer is willing to give, with the result that there can be significant variations between the ultimate sales price and honest, objective

appraisals. In the fall of the year, there is a noticeable slack in the real estate market in the Mill Valley area, which tends to cause the market price of residential property to decrease.

45. On November 6, 1958 (the date of the closing of plaintiff's sale of the Mill Valley residence), the basis for computing gain or loss for federal income tax purposes on a sale or exchange of plaintiff's Mill Valley residence was $37,640.67, computed as follows:

Item		Amount
Purchase price		$32,000.00
Purchase closing costs:		
Capital items:		
Title insurance	$222.90	
Notary fee	1.00	
Recording deed	3.90	
Recording deed of trust	8.00	
California tax agency	10.00	
ATA inspection	15.00	
		260.80
Capital improvements, draperies and carpets sold with the house		5,379.87
Total		37,640.67

Plaintiff purchased his Mill Valley residence incomplete. The builder had run into financial difficulties and the house was bought on a special deal "as is." The plaintiff had to finish the construction and add major appliances, such as, an oven and dishwasher, and even had to provide light fixtures. Although plaintiff contributed substantially to the completion of the Mill Valley residence through supervision and actual work performed, no allowance for such services has been made in determining his tax basis for the residence.

Ultimate Findings of Fact

46. Plaintiff was reimbursed for expenses incurred resulting from his transfer by IBM to a new permanent location. The reimbursements were made under established policies, administered in a businesslike manner and available to all employees required to relocate upon IBM's request.

47. The payments received by plaintiff under the Moving and Living Expense Policy and Home Guarantee Policy were intended by IBM to induce the employee to make the required move and to transfer his talents over to the new location with a minimal disruption in efficiency by relieving the employee of anxieties over the cost of moving his household to the new location, the sale of his home at the old location, and the cost of setting up a new home.

Conclusion of Law

Upon the foregoing findings of fact and opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover and the petition is dismissed.

APPENDIX B

Internal Revenue Code of 1954

Sec. 61. GROSS INCOME DEFINED.

(a) *General Definition.*—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;

(2) Gross income derived from business;

(3) Gains derived from dealings in property;

(4) Interest;

(5) Rents;

(6) Royalties;

(7) Dividends;

(8) Alimony and separate maintenance payments;

(9) Annuities;

(10) Income from life insurance and endowment contracts;

(11) Pensions;

(12) Income from discharge of indebtedness;

(13) Distributive share of partnership gross income;

(14) Income in respect of a decedent; and

(15) Income from an interest in an estate or trust.

Int. Rev. Code of 1954, § 61(a)

Sec. 62. ADJUSTED GROSS INCOME DEFINED.

For purposes of this subtitle, the term "adjusted gross income" means, in the case of an individual, gross income minus the following deductions:

(1) *Trade and Business Deductions.*—The deductions allowed by this chapter (other than by part VII of this subchapter) which are attributable to a trade or business carried on by the taxpayer, if such trade or business does not consist of the performance of services by the taxpayer as an employee.

(2) *Trade and Business Deductions of Employees.*—

(A) *Reimbursed Expenses.*—The deductions allowed by part VI (sec. 161 and following) which consist of expenses paid or incurred by the taxpayer, in connection with the performance by him of services as an employee, under a reimbursement or other expense allowance arrangement with his employer.

(B) *Expenses For Travel Away From Home.*—The deductions allowed by part VI (sec. 161 and following) which consist of expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in connection with the performance by him of services as an employee.

(C) *Transportation Expenses.*—The deductions allowed by part VI (sec. 161 and following) which consist of expenses of transportation paid or incurred by the taxpayer in connection with the performance by him of services as an employee.

(D) *Outside Salesmen.*—The deductions allowed by part VI (sec. 161 and following) which are attributable to a trade or business carried on by the taxpayer, if such trade or business consists of the performance of services by the taxpayer as an employee and if such trade or business is to solicit, away from the employer's place of business, business for the employer.

• • •

Int. Rev. Code of 1954, § 62(1), (2)

Sec. 162. TRADE OR BUSINESS EXPENSES.

(a) *In General.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

(1) a reasonable allowance for salaries or other compensation for personal services actually rendered;

(2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business;

. . . . .

* * *

Int. Rev. Code of 1954, § 162(a)(1), (2), as amended by Pub. L. No. 87-834, § 4, 76 Stat. 976-77 (1962) to strike from § 162(a)(2) "(including the entire amount expended for meals and lodging)" and to insert the above parenthetical clause.

Sec. 217. MOVING EXPENSES.

(a) *Deduction Allowed.*—There shall be allowed as a deduction moving expenses paid or incurred during the taxable year in connection with the commencement of work by the taxpayer as an employee at a new principal place of work.

(b) *Definition of Moving Expenses.*—

(1) *In General.*—For purposes of this section, the term "moving expenses" means only the reasonable expenses—

(A) of moving household goods and personal effects from the former residence to the new residence, and

(B) of traveling (including meals and lodging) from the former residence to the new place of residence.

(2) *Individuals Other Than Taxpayer.*—In the case of any individual other than the taxpayer, expenses referred to in paragraph (1) shall be taken into account only if such individual has both the former residence and the new residence as his principal place of abode and is a member of the taxpayer's household.

(c) *Conditions For Allowance.*—No deduction shall be allowed under this section unless—

(1) the taxpayer's new principal place of work—

(A) is at least 20 miles farther from his former residence than was his former principal place of work, or

(B) if he had no former principal place of work, is at least 20 miles from his former residence, and

(2) during the 12-month period immediately following his arrival in the general location of his new principal place of work, the taxpayer is a full-time employee, in such general location, during at least 39 weeks.

(d) *Rules for Application of Subsection (c)(2).*—

(1) Subsection (c)(2) shall not apply to any item to the extent that the taxpayer receives reimbursement or other expense allowance from his employer for such item.

(2) If a taxpayer has not satisfied the condition of subsection (c)(2) before the time prescribed by law (including extensions thereof) for filing the return for the taxable year during which he paid or incurred moving expenses which would otherwise be deductible under this section, but may still satisfy such condition,

then such expenses may (at the election of the taxpayer) be deducted for such taxable year notwithstanding subsection (c)(2).

(3) If—

(A) for any taxable year moving expenses have been deducted in accordance with the rule provided in paragraph (2), and

(B) the condition of subsection (c)(2) is not satisfied by the close of the subsequent taxable year,

then an amount equal to the expenses which were so deducted shall be included in gross income for such subsequent taxable year.

(e) *Disallowance of Deduction With Respect To Reimbursements Not Included in Gross Income.*—No deduction shall be allowed under this section for any item to the extent that the taxpayer receives reimbursement or other expense allowance for such item which is not included in his gross income.

(f) *Regulations.*—The Secretary or his delegate shall prescribe such regulations as may be necessary to carry out the purposes of this section.

Int. Rev. Code of 1954, § 217, as added by Pub. L. No. 88-272, 78 Stat. 51 (1964), to apply to expenses incurred after December 31, 1963, in taxable years ending after such date.

Sec. 262. PERSONAL, LIVING, AND FAMILY EXPENSES.

Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

Int. Rev. Code of 1954, § 262

Sec. 1001. DETERMINATION OF AMOUNT OF AND RECOGNITION OF GAIN OR LOSS.

(a) *Computation of Gain or Loss.*—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 1011 for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(b) *Amount Realized.*—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received. In determining the amount realized—

(1) there shall not be taken into account any amount received as reimbursement for real property taxes which are treated under section 164(d) as imposed on the purchaser, and

(2) there shall be taken into account amounts representing real property taxes which are treated under section 164(d) as imposed on the taxpayer if such taxes are to be paid by the purchaser.

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Int. Rev. Code of 1954, § 1001 (a), (b)